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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 444.

FLORENCE B. BIGELOW, MARION B. KOERBER, JOHN E. BLOOM and WILLIAM C. BLOOM, *Petitioners*,

v.

RKO RADIO PICTURES, INC., a corporation, LOEW'S, INCORPORATED, a corporation, TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation, PARAMOUNT PICTURES, INC., a corporation, BALABAN & KATZ CORPORATION, a corporation, VITAGRAPH, INC., a corporation, WARNER BROS. PICTURES, INC., a corporation, WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, a corporation, and WARNER BROS. THEATRES, INC., a corporation, *Respondents*.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITIONERS' REPLY TO RESPONDENTS' BRIEF.

Respondents admit (p. 3) that their Chicago system of release has been adjudged to have been maintained by an illegal conspiracy and that (prior to 1936 and therefore prior to the institution of double features) "clear" pictures were available to petitioners only because respondent

exhibitors did not want them for their competing prior run theatres. And this because (p. 7) "the 'clear' pictures which the petitioners obtained were only those inferior pictures which the prior run theatres did not contract for or **did not use.**"

This, then, is an admission of the fact that petitioners' theatre was damaged in its business even before 1936, because no matter what it was willing to pay for them it could obtain pictures only after respondents had rejected them. It therefore obtained only inferior pictures "clear" of the respondents' competing theatres.

The base for the measure of damages used by petitioners was the profit their theatre was able to earn in spite of respondent's conspiracy by use of the "inferior" pictures which had not already been shown in respondents' competing theatres.

Respondents next admit (p. 4) that, after double features were introduced in 1936, the additional pictures first used by respondent exhibitors and by them placed under the restrictions of the illegal system "thereby became less valuable to the petitioners."

This all sums up to an admission (1) that before 1936 petitioners' theatre was damaged because under the illegal conspiracy it was able to obtain only inferior "clear" pictures, and (2) that after 1936, when petitioners could not obtain even inferior "clear" pictures because the system was illegally extended even to those pictures, they were damaged still more by reason of being able to obtain only pictures which were "less valuable" because first played in respondent exhibitors' prior run theatres. This extension of the system was found by a jury and by the reviewing court to have been done pursuant to an illegal conspiracy (R. 2774). Obviously, then, the measure of damages which governs the case is the loss of profits which resulted to petitioners' theatre when respondents illegally took away from it even the "inferior" pictures which it had theretofore been able to obtain. This is the difference in

the profits of petitioners' theatre under (1) and (2) above, and petitioners proved, and the jury found this difference to be $120,000.

Respondents seek to confuse an appreciation of the simplicity of the issue by trying to make it appear that, because by their illegal system they prevented petitioners from bidding for earlier pictures, the only measure of damages available to petitioners was the loss of profits occasioned by this one illegal feature of the conspiracy. Conceding for the argument that [illegible] measure of damages for that wrongful act might be the difference between profits in an open market and profits under the system, such a measure has no relevance at all in determining whether the damages actually caused by the illegal extension of the system were supported by proof. Even respondents concede (p. 6) that "The evidence relied on by the petitioners was to the effect that double features caused the decline in their profits shown by their calculations."

This issue is confused in the reviewing court's opinion by a discussion of how much petitioners were damaged by being unable to bid for earlier pictures as compared with an "open market." Even on that issue there was evidence from which this could have been approximated inasmuch as the comparable Maryland (R. 1712) and Jeffrey theatres (R. 2073, 538) made a great deal more money than petitioners' theatre (R. 1732) [illegible] pictures (R. 262, 1740). In the case of the Jeffrey this amounted to approximately $266,000 during the period covered by the suit (R. 2073, 1712). But all this is surplusage so far as the issue now presented is concerned. The question is whether the $120,000 actually proven is supported by any legally correct theory.

It is in the imposition of a completely arbitrary and, to the extent noted above, irrelevant theory of damages that the vice in the reviewing court's opinion resides. It is quite apparent that a comparison between actual earnings and "open market" earnings would have shown dam-

ages greatly in excess of those allowed by the jury. This comparison could not be proven under the measure demanded by the reviewing court because respondents, as they now admit (p. 4), had destroyed all possibility of proving any profits except under the conditions imposed by their illegal conspiracy. But the reviewing court and respondents in effect say that, because the conspiracy itself prevents proof of damages in excess of those allowed by the jury, therefore petitioners cannot support the verdict with the damages which resulted from illegal double featuring.

Respondents say (p. 8):

> "Even if it be assumed, therefore, that plaintiffs' profits under the illegal system were reduced as a result of double featuring, there still is no evidence from which it could be determined whether their profits, as so reduced, were more or less than they would have been but for the conspiracy."

But there is the conclusive evidence that the extension of the conspiracy by double featuring resulted in a loss of profits (R. 174). It should also be noted that, unless it kept patrons from petitioners' theatre, there was no point to respondents' conspiracy. Its object was admitted to be "primarily" to benefit the prior runs at the expense of theatres such as petitioners' (R. 936, 937). Men who had been in the business all their lives designed the system to accomplish this purpose, and any jury had a right to infer that respondents were suppressing petitioners' competition in order to make their profits less than in an open market. It was admitted that this was so (R. 351, 717, 718).

Respondents next say (p. 8):

> "The petitioners placed themselves in their present predicament by failing to take a position at any stage of this case as to when the conspiracy complained of began, or when it first affected the profits of their theatre."

But petitioners, not being members of the conspiracy, could not prove when it had its inception. At the trial they did not have available the admission now made by respondents (p. 4):

> "The conspiracy which prevented the petitioners from bidding for runs and clearance was in effect long prior to and during both of these periods."

Petitioners did offer to prove the earnings of their theatre at a time when it played pictures ahead of the Maryland and the Jeffrey (R. 312, 313). Respondents objected to such proof as being too remote in time and the trial court sustained the objection (R. 314, 315).

It is significant that respondents make no answer to petitioners' contention that the public generally has an interest in the affirmance of the jury's verdict. The matters of public import are so obvious that respondents' studied effort to ignore them gives them added emphasis. The case presents to this Court the issue of whether a verdict which has vindicated the public's right to an open market can be ruthlessly set aside by the imposition of an arbitrary and irrelevant measure of damages as a condition of recovery.

The fact that these rights are presented through the medium of a private suit for damages in no manner discounts them or minimizes their importance to the general public as well as to the independent theatre owners who are the victims of the system and who are deprived by the reviewing court's opinion of any recourse to the courts for their damages.

CONCLUSION

We respectfully submit that, for the reasons given here and in our original petition, the writ of certiorari should issue.

Respectfully submitted,

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